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Beard v. Banks: Restricted Reading, Rehabilitation, and Prisoners' First Amendment Rights

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**BEARD V. BANKS:
RESTRICTED READING, REHABILITATION,
AND PRISONERS' FIRST AMENDMENT
RIGHTS**

*Anna C. Burns**

When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded . . . It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.¹

INTRODUCTION

Punishment, sentencing, prison: the very act of removing an individual from society implies deprivation.² Though prisoners may be subject to regulation, they do not lose their basic human rights. Based upon years of prisoners' challenges to regulation of their First Amendment rights, the Supreme Court has

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¹ *Procunier v. Martinez*, 416 U.S. 396, 428 (1974) (Marshall, J., concurring), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 104 (1989).

² *Price v. Johnson*, 334 U.S. 266, 285 (1948).

developed a framework to review such challenges, equally respectful of the goals of prison administration and the preservation of rights. As most recently applied in *Beard v. Banks*, however, the framework loses sight of this balance, suggesting that prisoners may ultimately be deprived of future protection.

Deprivation of prisoners' First Amendment freedoms was first analyzed by the Supreme Court in *Procunier v. Martinez*,³ a case involving personal correspondence between inmates and the underlying administrative censorship procedures to maintain safety.⁴ While stressing the importance of the freedom to communicate, the Court noted that "some latitude is . . . essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more . . . legitimate governmental interests."⁵

Then, in 1987, in *Turner v. Safley*,⁶ the Supreme Court provided a more in-depth analysis of its standard of review, noting that if a "prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁷ Furthermore, the Court established a four-factor test, looking towards (1) rationality, (2) whether any alternatives remained open to prisoners, (3) the impact of the freedom on the general prison population, and (4) whether there was a less restrictive alternative.⁸

While the *Turner* structure has been successfully applied in cases involving censorship or deprivation of letters,⁹ content-specific newspapers or magazines,¹⁰ literature discussing

³ *Procunier*, 416 U.S. 396.

⁴ *Id.*

⁵ *Id.* at 414.

⁶ *Turner v. Safley*, 482 U.S. 78 (1987).

⁷ *Id.* at 89.

⁸ *Id.* at 89-91.

⁹ *Abbott v. Meese*, 824 F.2d 1166 (1987).

¹⁰ *Id.*

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sexuality,¹¹ and regulation of visitors to prisons,¹² all of these cases hinged upon the importance of maintaining order and security within the prison system. As *Turner* illustrated, if the censorship or limitation is reasonably related to legitimate penological interests, then claims of safety have found both support and deference in the courts.¹³

However, the Supreme Court's recent ruling in *Beard v. Banks*¹⁴ presents a question as to the continuing validity of the *Turner* test. In *Banks*, inmates in the "most restrictive level" of a Pennsylvania prison were not allowed access to newspapers, magazines, or personal photographs.¹⁵ All inmates in the prison were initially placed in this most restrictive level and therefore deprived of access to these items upon arrival.¹⁶ Although some inmates eventually progressed into a less restrictive area of the prison, "in practice most [did] not."¹⁷ That is, most prisoners continued to face severe restrictions on their access to visitors, phone calls, and commissary,¹⁸ and were additionally denied access to newspapers, magazines, and personal photographs.¹⁹

Reviewing the justification of the regulation, the Supreme Court relied on the Pennsylvania Prison Secretary's belief that such deprivation was necessary "to motivate better behavior on the part of [these] particularly difficult prisoners, by providing them with an incentive"²⁰ to change levels in the prison, and to "discourage backsliding."²¹ Not wanting to appear as if it were

¹¹ Willson v. Buss, 370 F. Supp. 2d 782 (N.D. Ind. 2005).

¹² Overton v. Bazzetta, 539 U.S. 126 (2003).

¹³ Turner v. Safley, 482 U.S. 78, 91-93 (1987).

¹⁴ Beard v. Banks, 126 S. Ct. 2572 (2006).

¹⁵ *Id.* at 2575.

¹⁶ *See id.* at 2576.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* These limitations should be viewed in concert with the denial of prisoner access to television and radio in all levels of LTSU as well as within other units of the prison. *Id.*

²⁰ Beard v. Banks, 126 S. Ct. 2572, 2578-79 (2006).

²¹ *Id.* at 2579 (citing Brief of Appellant at 26, Beard v. Banks, 126 S. Ct. 2572 (2006)).

deferring to administrators without applying the balancing test, the Court danced through the *Turner* analysis with decidedly little interest. Accepting the musings of prison officials as fact, the Court found the regulations necessary and reasonable. Yet, because the justification was rehabilitation, the Court's use of the *Turner* test appeared "poorly suited" to the task, unable to strike a real balance between deprivation and constitutional freedoms.²²

The limitation was upheld. Deferential review paved the way for the approval of a restriction which imposes severe limits on prisoners' First Amendment freedoms—limits conditioned solely upon incarceration and which are likely to continue for the term of a sentence.²³ While the administrators' goals of maintaining control over prisoner behavior, minimizing property in cells, and ensuring safety²⁴ are logical and rational, it does not automatically follow that the restrictions on access to newspapers, magazines and personal photographs are reasonably related or tailored to those goals.²⁵ The Court, however, accepted the goal of rehabilitation without acknowledging the faulty tailoring.

Part I of this Comment examines the development of the *Turner* test and its importance in evaluating challenges to deprivation of prisoners' First Amendment rights. Part II illustrates successful application of the test in various First Amendment cases involving prisoner access to certain writing and reading materials. Part III then addresses the specifics of *Beard v. Banks*, focusing on the misapplication of the *Turner* test. Finally, Part IV explores the policy implications of *Banks*, addressing the deprivation/rehabilitation theory espoused by the prison officials, and concludes with a call for greater scrutiny in the courts, as well as local action on the part of legislators and prison administrators, to ensure the preservation of prisoners' fundamental rights.

²² *Id.* at 2584-85 (Thomas, J., concurring).

²³ *See id.* at 2576.

²⁴ *Id.* at 2578.

²⁵ *Id.* at 2586-92 (Stevens, J., dissenting).

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I. HISTORICAL DEVELOPMENT OF THE *TURNER* TEST

This Part examines the foundational case law of prisoners' First Amendment rights and the evolution of the *Turner* test. Section A considers *Procunier v. Martinez*,²⁶ the inaugural case involving prisoners' First Amendment rights. Section B examines *Procunier*'s progeny, a line of cases emphasizing the need for alternative means of expression and the importance of deferential review. Finally, Section C reviews *Turner* and frames the resulting four-part test. This section concludes with a discussion of Justice Stevens' dissent, suggesting that the *Turner* standard is not as reliable or well-crafted as the majority assumed.

A. *First Amendment Prisoner Rights in Procunier v. Martinez*²⁷

The Supreme Court first addressed First Amendment rights of prisoners in the 1974 case of *Procunier v. Martinez*.²⁸ In *Procunier*, prisoners challenged state prison policies regarding censorship and monitoring of inmate correspondence. Certain prison regulations prohibited inmates from "writ[ing] letters in which they 'unduly complain[ed]' or 'magnif[ied] grievances,'"²⁹ or expressing "inflammatory political, racial, religious or other views or beliefs. . .,"³⁰ as well as discussing criminal mischief, or "otherwise inappropriate" items.³¹ Where enforcement was concerned, however, there was little guidance for prison officials as to how the inmate correspondence should

²⁶ 416 U.S. 396 (1974).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 399 (citing California Department of Corrections Director's Rule 1201).

³⁰ *Id.* (citing California Department of Corrections Director's Rule 1205).

³¹ *Id.* at 400 (citing California Department of Corrections Director's Rule 2402(8)).

be reviewed.³²

Articulating the first standard of review for limitations on prisoners' First Amendment rights, the Supreme Court expressed some hesitation about intruding into the realm of prison administration.³³ However, the Court made it clear that consistency was desperately needed to define the permissible reach of judicial review within the prison system.³⁴ Addressing the issue of censorship in a broader context, the Court looked not only at the denial of the prisoners' right of free expression under the First Amendment, but also at the effect of the denial on those with whom the inmate was corresponding.³⁵ Drawing on a previous First Amendment case,³⁶ the Court articulated a new two-part analysis for cases specifically dealing with

³² *Procunier v. Martinez*, 416 U.S. 396, 400 (1974).

³³ *Id.* at 404.

³⁴ *Id.* at 406-08.

³⁵ *Id.* at 408-10.

³⁶ The previous First Amendment case referred to is *United States v. O'Brien*, 391 U.S. 367 (1968). *O'Brien* involved governmental restrictions on free speech. O'Brien burned his selective service registration certificate on courthouse steps in demonstration of his feelings toward the military draft and the Vietnam War. In addressing O'Brien's actions, the Court noted that even though O'Brien was using free expression, the First Amendment did not act as an ultimate shield allowing all behaviors. *O'Brien*, 391 U.S. at 376.

Realizing that government regulations would inevitably touch free speech and the First Amendment from time to time, the court created a four-part test to review such restrictions. *Id.* at 376-78. First, the restriction may be sufficiently justified if it is within the government's power. *Id.* Second, the restriction will have support if it furthers an important or substantial government interest. *Id.* Third, the restriction should not be related to the suppression of expression. *Id.* Finally, the restriction should be no greater than is necessary to accomplish the governmental objective. *Id.*

Reviewing *O'Brien* within the context of *Procunier*, the Supreme Court emphasized that *Procunier* also involved governmental regulations, unrelated to the suppression of expression, but that impinged on First Amendment rights nonetheless. *Procunier*, 416 U.S. at 410-14. Recognizing that the test in *O'Brien* was best suited for situations in which individuals were not constrained or isolated from society, the court then formulated a new test in *Procunier* based loosely on two of the important factors in *O'Brien*. *Id.* at 413-14.

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suppression of prisoners' freedom of expression.³⁷ First, any restriction imposed by prison officials must "further an important or substantial governmental interest unrelated to the suppression of expression. . ." and second, the limitation may not extend too far, but rather, must be only what is "necessary or essential to the protection of the particular governmental interest involved."³⁸ The Court noted that the regulations provided no guidance to prison officials concerning how or what to look for in censoring correspondence, and that there was little justification for the furtherance of any penological interest.³⁹ Accordingly, the Court affirmed the invalidation of the regulations.⁴⁰

B. The Lead-Up to Turner

Over the next decade, armed with the *Procunier* framework, the Court addressed a variety of inmates' First Amendment cases. Beginning with *Pell v. Procunier*,⁴¹ the Court began to view the presence of alternative means of expression with heightened importance. Similarly, deference to prison administrators who dealt with inmates on a day-to-day basis weighed more heavily in the analysis. In the following section, the cases of *Pell*, *Jones v. N.C. Prisoners' Union*,⁴² *Bell v. Wolfish*,⁴³ and *Block v. Rutherford*,⁴⁴ illustrate the evolution of *Procunier*, culminating in the *Turner* framework.

³⁷ *Procunier*, 416 U.S. at 413-14.

³⁸ *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974).

³⁹ *Id.* at 415-16.

⁴⁰ *Id.*

⁴¹ 417 U.S. 817 (1974).

⁴² 433 U.S. 119 (1977).

⁴³ 441 U.S. 520 (1979).

⁴⁴ 468 U.S. 576 (1984).

1. Pell v. Procunier—1974

In *Pell v. Procunier*, the Supreme Court addressed prisoners' claims that regulations prohibiting them from engaging in face-to-face media interviews amounted to an unlawful infringement on their freedom of expression.⁴⁵ Under the first prong of *Procunier*, the Court noted that limiting visits from strangers was clearly related to important governmental interests of prison safety, deterrence of crime, and rehabilitation.⁴⁶ Indeed, all three interests were threatened when strangers were allowed face-to-face contact with inmates, as such visits often led to disciplinary problems.⁴⁷

Addressing the second *Procunier* factor, narrow tailoring of the restriction, the Court in *Pell* reasoned that the limitation of expression in face-to-face media interviews should not be assessed in an isolated context, but instead viewed in connection with possible alternative forms of expression available to inmates.⁴⁸ It was clear to the Court that alternatives did exist. Because inmates were able to express their views through the mail and personal visits with friends and family, they had not been totally deprived or censored in their expression.⁴⁹ Indeed, the Court noted that "although [security concerns] would not permit prison officials to prohibit all expression or communication by prison inmates, security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates."⁵⁰ The analysis in *Pell*, therefore, added a third factor to be considered alongside the two articulated in *Procunier*, namely,

⁴⁵ *Pell v. Procunier*, 417 U.S. 817 (1974).

⁴⁶ *Id.* at 822-23.

⁴⁷ *Id.* at 831-32.

⁴⁸ *Id.* at 823.

⁴⁹ *Id.* at 824-25.

⁵⁰ *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

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the availability of alternatives to prisoners.⁵¹

2. *Jones v. N.C. Prisoners' Labor Union—1977*

The *Procunier* test was again applied in *Jones v. N.C. Prisoners' Labor Union*.⁵² At issue were regulations prohibiting inmates from joining or meeting as a prison union, and forbidding the delivery of packets sent to inmates from outside union organizers.⁵³ Emphasizing the realities of operating a prison system, the Court looked to *Procunier* and the importance of affording deference to prison officials.⁵⁴ Under the first prong of *Procunier*, the Court addressed the importance of the governmental interest involved. Relying on correctional officers' testimony that prisoner unions created added tension between prisoners and prison officials and increased the likelihood of riots, work stoppages, and misuse of influence amongst other prisoners,⁵⁵ the Court noted that "the ban on inmate solicitation and group meetings . . . was rationally related to the reasonable, indeed to the central, objectives of prison administration."⁵⁶

Regarding the prohibition against bulk mailing from outside union organizers,⁵⁷ under the second prong of *Procunier*, the Court recognized that the prohibition limited prisoners' First Amendment rights. However, it reasoned that although bulk mailing was restricted, there were alternative means by which outside union organizers could communicate with prisoners.⁵⁸ Again, as in *Pell*, the need for alternative forms of expression was emphasized. So long as the prison was not limiting all avenues of communication between prisoners and outside union organizers, then the restriction on bulk mailing did not go too

⁵¹ *Id.* at 823.

⁵² 433 U.S. 119 (1977).

⁵³ *Id.* at 121.

⁵⁴ *Id.* at 126.

⁵⁵ *Id.* at 127.

⁵⁶ *Id.* at 129.

⁵⁷ *Id.* at 130-31.

⁵⁸ *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 130-31 (1977).

far in the context of the second prong of *Procunier*.⁵⁹

The Court then turned to the restrictions on “inmate-to-inmate solicitation of membership [in unions],”⁶⁰ and the prohibition on prisoner union meetings. Here, unlike the restriction on bulk mailings, the Court did not find a violation of prisoners’ First Amendment rights.⁶¹ Instead, the Court noted the importance of the government interest involved—the need for prison management and organization—and concluded that “numerous associational rights are necessarily curtailed by the realities of confinement.”⁶² Prisoners’ unions would no doubt create difficulties for prison officials in maintaining order and peace among inmates.⁶³ The Court found these to be reasonable objectives under *Procunier*, concluding “the regulations [were] drafted no more broadly than they [needed] to be to combat the perceived threat stemming directly from group meetings and organizational activities of the Union.”⁶⁴ *Jones* thus represents a clear application of the *Procunier* test, while also highlighting the need for alternative means of expression when prisoners’ First Amendment rights are infringed.

3. *Bell v. Wolfish*—1979

Straightforward application of *Procunier* and an emphasis on alternative means of expression is also illustrated by *Bell v. Wolfish*, a case involving restrictions placed on pre-trial detainees’ receipt of, among other things, hardcover books.⁶⁵

⁵⁹ *Id.*

⁶⁰ *Id.* at 131.

⁶¹ *Id.* at 131-32.

⁶² *Id.* at 132.

⁶³ *Id.*

⁶⁴ *Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119, 133 (1977).

⁶⁵ *Bell v. Wolfish*, 441 U.S. 520, 520 (1979). Generally, prison officials were concerned about security and administrative issues when inmates received bound items from individuals outside of prison. *Id.* at 549. Hardcover books posed a specific problem as, before they would be distributed to inmates, prison officials would need to ensure that the books did not contain drugs, money, or weapons. *Id.* This in turn required a

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Specifically, pre-trial detainees were subject to a “publisher-only” rule, and only allowed to receive books and magazines mailed directly from an outside publisher or bookstore.⁶⁶ Under the first part of *Procunier*, the Court referred to the prison warden’s affidavit that “‘serious’ security and administrative problems were caused when bound items were received by inmates from unidentified sources outside the facility.”⁶⁷ As the mailing of books (particularly hardcover) from outside individuals increased the possibility that contraband could be smuggled into the prison, the Court affirmed the restriction as rational.⁶⁸

Reviewing the second *Procunier* requirement, the Court noted that the specific limitation on hardcover books did not appear overly broad,⁶⁹ and concluded that “the considered judgment of [prison officials] must control in the absence of prohibitions far more sweeping than those involved here.”⁷⁰ The Court also emphasized that ready alternatives existed for inmates to access reading materials: books and magazines could be sent directly from publishers, bookstores, or book clubs,⁷¹ and inmates also had access to the correctional center’s library of over 3,000 hardcover and 5,000 paperback books.⁷² Applying *Procunier* to the restriction at issue, the Court found legitimate reasons for the restriction as well as several alternatives for prisoners’ First Amendment expression.

thorough search of the books, where the covers would be removed and the pages individually leafed through. *Id.*

⁶⁶ *Id.* at 548-49. The prison officials reasoned that the burden of leafing through pages and removing book covers would not be necessary if books were sent directly by the publishers, as there would be an extremely low probability that a publisher would send contraband. *Id.* at 549.

⁶⁷ *Id.* at 549.

⁶⁸ *Id.* at 550-51.

⁶⁹ *Id.* at 551.

⁷⁰ *Bell v. Wolfish*, 441 U.S. 520, 552 (1979).

⁷¹ *Id.* at 551.

⁷² *Id.* at 552 n.33.

4. *Block v. Rutherford*—1984

Block v. Rutherford, like *Bell*, also involved claims brought by pre-trial detainees,⁷³ and further changed the landscape of *Procunier* by re-framing the first prong of the test. *Rutherford* involved a ban on contact visits for pre-trial detainees, which the detainees argued constituted a violation of their due process rights.⁷⁴ Instead of asking whether the regulation furthered an important or substantial governmental interest unrelated to the suppression of expression, the Court inquired only as to whether the prohibition was “reasonably related to the security of the facility” as justified by the prison administration.⁷⁵ Refusing to delve too far into the rationale behind the restriction, the Court found it obvious that contact visits created the potential for internal security problems.⁷⁶

The Court next turned to an analysis under the second prong of *Procunier*. Unlike the courts below, the Supreme Court rejected the idea that the restriction was impermissibly excessive in relation to the security concerns proffered by the prison administrators.⁷⁷ Focusing instead on the difficulty of functional

⁷³ *Block v. Rutherford*, 468 U.S. 576 (1984).

⁷⁴ *Id.* at 578. Specifically, the pre-trial detainees were prohibited from touching spouses, relatives, and friends. *Id.* The detainees were, however, permitted “unmonitored non-contact visits” for twelve hours a day. *Id.* These non-contact visits involved an inmate sitting on one side of a clear glass panel, with the visitor on the other side. *Id.* The parties were able to communicate through a telephone but could not physically touch. *Id.*

⁷⁵ *Id.* at 586.

⁷⁶ *Id.*

⁷⁷ *Id.* at 587. In addressing the detainees’ claims regarding visitation restrictions, the district court had recognized that “to allow unrestricted contact visitation would add greatly to the Sheriff’s security problems and reduce the number of allowable visits. On the other hand, it is equally obvious that the ability of a man to embrace his wife and his children from time to time during the weeks or months while he is awaiting trial is a matter of great importance to him.” 457 F. Supp. 104, 110 (C.D. Cal. 1978). The district court went on to emphasize the importance of evaluating prisoners when they first arrive, and classifying the prisoners accordingly. *Id.* Those prisoners that presented the greatest security threats could indeed be denied

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alternatives and the resulting burdens on administrators, the Court dismissed the need to use less restrictive means.⁷⁸ Specifically, the Court noted that the “burdens of identifying candidates for contact visitation. . . [were] made even more difficult by the brevity of detention and the constantly changing nature of the inmate population.”⁷⁹ Furthermore, there was great potential for problems if certain detainees were allowed visits while others were denied the same privileges.⁸⁰ The Court concluded that the “blanket prohibition” on contact visits was “an entirely reasonable, non-punitive response to the legitimate security concerns identified.”⁸¹ Thus, unlike *Pell*, *Jones*, and *Bell*, the Court did not hesitate to uphold the restriction even though it affected all prisoners uniformly and failed to provide any alternative means of visitation. Instead, under the second prong of *Procunier*, the Court justified the limitation as only going as far as necessary to protect prison safety.⁸²

Examination of *Pell*, *Jones*, and *Bell* illustrates the importance of deference to prison officials, while also highlighting the Court’s retreat from the idea that alternative means of expression are always required. Taken together, these cases suggest that if a restriction is necessary and essential to protect penological interests, it may be deemed valid even if no

visitation for safety reasons. *Id.* However, for those low-risk inmates, the court reasoned it would be proper to allow one visit per week. *Id.* The goal was to treat “inmates with reasonable humanity without unduly increasing the problems of security.” *Id.*

On appeal, the Ninth Circuit affirmed the district court’s analysis, noting that “the institution’s security interests do not always predominate. A blanket restriction on contact visits for all detainees may present an unreasonable, exaggerated response to security concerns at a particular facility.” 710 F.2d 572, 577 (9th Cir. 1983). The Ninth Circuit approved of the district court’s order for minimal visits, noting that if the prisoners did not raise security concerns, then there would be no sense in depriving them of contact visits. *Id.*

⁷⁸ Block v. Rutherford, 468 U.S. 576, 587-88 (1984).

⁷⁹ *Id.* at 587.

⁸⁰ *Id.*

⁸¹ *Id.* at 588.

⁸² *Id.*

alternative means of expression are available.

*C. Turner v. Safley*⁸³

By 1987, the Supreme Court, as well as lower courts across the country, had dealt with numerous cases involving the restriction of prisoners' First Amendment rights.⁸⁴ *Turner v. Safley* represented an important shift in the Court's analysis of such cases, and resulted in a new framework, replacing that of *Procunier*.

In *Turner*, prisoners brought two challenges to prison regulations: one dealing with First Amendment rights, the other concerning the constitutional right to marry.⁸⁵ Specifically, prison regulations prohibited inmates from corresponding with

⁸³ 482 U.S. 78 (1987).

⁸⁴ See *infra* Parts IA and IB, with reference to *Procunier v. Martinez*, 416 U.S. 396 (1974) (holding that correspondence between inmates can be limited); *Pell v. Procunier*, 417 U.S. 817 (1974) (finding face-to-face media interviews were permissibly limited); *Jones v. N.C. Carolina Prisoners' Union*, 433 U.S. 119 (1977) (upholding ban on prison inmate solicitation and sending of bulk packages); *Bell v. Wolfish*, 441 U.S. 520 (1979) (upholding restriction that inmates may only receive books and magazines mailed directly from publishers); *Block v. Rutherford*, 468 U.S. 576 (1984) (holding contact visits for pre-trial detainees can be limited). See also, *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir. 1985) (finding prisons cannot deny prisoners access in receiving reports on prison conditions without justification of penological interests); *Shabazz v. O'Lone*, 782 F.2d 416 (3d Cir. 1985) (holding prisons cannot restrict prisoners from attending weekly religious services unless prison shows that restriction serves important security purposes); *Vester v. Rogers*, 795 F.2d 1179 (4th Cir. 1986) (holding prison may prohibit correspondence between prisoners); *Taylor v. Sternett*, 532 F.2d 462 (5th Cir. 1976) (holding prison officials may not open inmates' correspondence with attorneys, probation officers, governmental agencies, and the press unless there is a reasonable possibility that contraband is included in the mail); *Aikens v. Jenkins*, 534 F.2d 751 (7th Cir. 1976) (finding regulation that prohibits prisoners' from having any photographs or paintings of nudes is impermissibly broad); *United States v. Baumgarten*, 517 F.2d 1020 (8th Cir. 1975) (screening inmates' mail is permissible if regulation is for security purposes and goes no further than necessary).

⁸⁵ See generally, *Turner*, 482 U.S. 78.

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one another, and banned inmate marriages in the absence of prior prison approval.⁸⁶ Confirming the prisoners' right under *Procunier* to petition for review of the letter-writing restrictions, Justice O'Connor noted that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution."⁸⁷ However, in the same breath, the Court emphasized the importance of cautious judicial review of prison regulations.⁸⁸

Before proceeding to examine the regulations at issue, the Court articulated a more exacting standard of review than the one first pronounced in *Procunier*, holding that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁸⁹ The Court then laid out a four-part test to be used in analyzing the regulation, its impacts, and possible alternatives.

First, addressing the need for logic and objectivity, there must be "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward."⁹⁰ Additionally, the Court acknowledged that *Pell*⁹¹ and *Bell*⁹² required that the asserted penological interest be neutral and objective, and not content based.⁹³

Second, the Court noted that the existence of alternative forms of expression for prisoners should also be considered in assessing the deprivation of rights.⁹⁴ Because regulations and restrictions should not be viewed in isolation, if one mode of

⁸⁶ *Id.* at 81-82.

⁸⁷ *Id.* at 84.

⁸⁸ *Id.* at 85.

⁸⁹ *Id.* at 89.

⁹⁰ *Id.* (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

⁹¹ *Pell v. Procunier*, 417 U.S. 817, 828 (1974).

⁹² *Bell v. Wolfish*, 441 U.S. 520, 551 (1979).

⁹³ *Turner v. Safley*, 482 U.S. 78, 89-90 (1987).

⁹⁴ *Id.* at 90. The Court focused on *Pell*'s contribution to this idea of alternative channels of expression. If there were indeed "other avenues" for prisoners' First Amendment rights, then reviewing courts should be more deferential to prison officials. *Id.* (citing *Pell*, 417 U.S. at 827).

expression was limited in order to advance valid interests, it was necessary to determine what other options remained open, suggesting the importance of deference while recognizing the need to protect prisoners from total deprivation.⁹⁵

Third, the Court found it necessary to analyze the difficulties a prison would face were it forced to provide the freedom requested by the inmate.⁹⁶ Potential effects on prison administration, officials, the implication for other inmates, and the stated goals of the regulation were all considered.⁹⁷

Finally, the fourth *Turner* factor focused on whether there were less restrictive alternatives that would accomplish the same objectives.⁹⁸ If equally effective alternatives exist, there is a presumption that the chosen restriction constitutes an unlawful “exaggerated response.”⁹⁹ The Court noted, however, that the burden of showing a less restrictive alternative falls on the prisoner rather than officials.¹⁰⁰ Furthermore, the Court cautioned that the fourth factor should not be viewed as a “least restrictive alternative test.”¹⁰¹ Rather, if an inmate were to present a workable alternative that satisfied the goal while also accommodating First Amendment rights “at *de minimis* cost,” it could indicate that the regulation was not truly reasonable.¹⁰²

Applying the newly articulated four-part test to the facts of *Turner*, the Court first addressed the limitation on correspondence with inmates at other prisons.¹⁰³ Searching for a rational connection between the regulation and a legitimate

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 90-91.

⁹⁹ *Turner v. Safley*, 482 U.S. 87, 90 (1987).

¹⁰⁰ *Id.* at 91.

¹⁰¹ *Id.* at 90-91. It appears the Court was concerned that a test requiring the least restrictive alternative would place too much of a procedural burden on prison administrators, and so emphasized that review of regulations should not require an administrator to “set up and then shoot down every conceivable alternative method of accomoda[tion].” *Id.*

¹⁰² *Id.* at 90-91.

¹⁰³ *Id.* at 91.

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penological interest, the Court cited prison officials' testimony that mail between prisoners could be used to arrange attacks, escapes, gang affiliations, and the like.¹⁰⁴ The Court observed that the restriction was logically connected to legitimate security concerns in general prison administration and not content based.¹⁰⁵

Addressing the second and third factors, the Court briefly noted that the limitation on inmate-to-inmate correspondence did not necessarily limit freedom of expression, as prisoners were still able to exercise their First Amendment rights through correspondence with non-inmates.¹⁰⁶ Furthermore, the Court recognized that if the letter writing were allowed, the negative impact on prison administration would be too burdensome. Citing the "potential [of a] 'ripple effect'" from one prison to another,¹⁰⁷ the Court concluded that it was much more hazardous to allow the letter writing than to limit it.

Finally, the Court noted that the prisoners challenging the regulation had failed to point to any "obvious, easy

¹⁰⁴ *Id.* Confirming the logic behind the prohibition on letter writing, the Court pointed to similar restrictions that kept inmates or former inmates from communicating with one another, such as after one is released on parole. *Id.* at 92. Additionally, the Court noted a Missouri prison policy of keeping inmates separate so as to reduce gang association amongst inmates. *Id.* at 92. These goals could only be furthered by the restriction on inmate-to-inmate correspondence. Along these lines, the Court also emphasized that the regulation only prohibits such conduct between prisoners at other Missouri correctional institutions. *Id.*

¹⁰⁵ *Turner v. Safley*, 482 U.S. 87, 91-92 (1987).

¹⁰⁶ *Id.* One could also assume that communication could occur during contact visits or phone calls. Notably, the Court did not spend sufficient time worrying about alternatives for prisoners to express themselves, and turned to address the impact of allowing the right on the prison. *Id.* at 91-92.

¹⁰⁷ *Id.* Here, the Court focused on the impact of allowing letter writing between prisoners, forcing prison officials to read every letter and to excise any dangerous content. *Id.* Noting that this would impose significant costs on the prison system and would present the risk that staff would not be able to catch certain coded messages, the Court affirmed that the alternative was insufficient at reaching the penological goal. *Id.*

alternatives.”¹⁰⁸ Although the plaintiffs had suggested that inmate-to-inmate communications be monitored or read by prison administrators instead, the Court quickly dismissed that idea as “impos[ing] more than a *de minimis* cost on the pursuit of legitimate corrections goals.”¹⁰⁹ Furthermore, the Court noted the skepticism of prison officials in making such an alternative work, as it would be more difficult to read and monitor prisoner-to-prisoner correspondence, citing the possibility that dangerous messages could escape detection through gang-related codes.¹¹⁰ The Court concluded that the limitations on prisoner correspondence were fully justified and did not violate prisoners’ First Amendment rights.¹¹¹

If the limitation on inmate correspondence were the only regulation called into question in *Turner*, it is likely that the Court’s overall analysis would have been exceedingly deferential. Indeed, much of the Court’s decision was based on prison officials’ testimony and the possibility of negative consequences if the right to correspond were allowed.¹¹² Accepting these conjectures at face value, the Court demonstrated its trust of officials in calculating and responding to probable harms. The Court’s deference, however, did not extend to the restriction on the right of inmates to marry. Addressing the ban on inmate marriage, the Court scrutinized the regulation’s paltry justifications, and concluded that such an overbearing restriction was an unconstitutional limitation on the fundamental right to marry.¹¹³

Examining the reasoning behind the marriage restriction, the Court ridiculed the security concerns expressed by prison officials, including the claims that “love triangles might lead to violent confrontations between inmates,” and that female prisoners needed to be kept away from certain types of men and

¹⁰⁸ *Id.* at 93.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Turner v. Safley*, 482 U.S. 78, 93 (1987).

¹¹² *Id.* at 106 n.5

¹¹³ *Id.* at 97-100.

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encouraged to seek healthier relationships.¹¹⁴ The Court found that the regulation was over-reaching, pointing to viable alternatives that would allow inmates to marry while still ensuring prison security.¹¹⁵ The claim that female prisoners' rehabilitation would be aided by a restriction on marriage was dismissed outright.¹¹⁶ There was no legitimate penological interest, nor was the restriction at all rationally related to the proffered goal.¹¹⁷ The regulation could not pass muster under the first prong of the *Turner* test and so the ban on inmate marriage was struck down without further review.¹¹⁸

The Court's decision in *Turner* was not unanimous. In dissent, Justice Stevens noted that the new framework espoused by the majority was useless: "if the standard [could] be satisfied by nothing more than a '*logical*' connection' between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless."¹¹⁹ Emphasizing its absurdity, Justice Stevens claimed that the test would permit a warden's mere imagination to establish legitimate security concerns.¹²⁰ Arguably, the test would allow far reaching anticipatory restrictions because *Turner* did not require evidence or even a suggestion of need.¹²¹

¹¹⁴ *Id.*

¹¹⁵ *Id.* The Court noted 28 C.F.R. § 551.10 (1986), a federal prison regulation that permitted inmate marriage unless a warden had cause to believe the marriage would otherwise threaten the security of the prison or the general public safety. *Turner*, 482 U.S. at 98.

¹¹⁶ *Id.* at 98-100.

¹¹⁷ While recognizing the need to regulate the particulars of marriage ceremonies in prison, the Court noted that "the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives." *Turner v. Safley*, 482 U.S. 87, 99 (1987).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 100 (Stevens, J., dissenting) (internal citations omitted).

¹²⁰ *Id.* at 100-01.

¹²¹ *Id.*

II. *TURNER* APPLIED

Part I of this Comment traced the evolution of standards for First Amendment challenges to prison regulations. Part II reviews a sampling of specific First Amendment prisoner cases concerning restrictions that limit prisoners' access to books, magazines, and other reading materials. At first glance, the *Turner* test appears fair, favoring deference to prison officials, while still weighing the importance of prisoners' rights. In fact, the four-factor analysis was undertaken with ease by various lower courts. The following discussion concerns several instances in which restrictions on prisoners' First Amendment rights were upheld under the *Turner* framework.

A. *Thornburgh v. Abbott*¹²²

Abbott involved a challenge to prison restrictions on incoming publications for inmates.¹²³ Pursuant to Federal Bureau of Prison regulation 28 C.F.R. § 540.71, wardens were authorized to reject incoming publications if they were deemed to be "detrimental to the security, good order, or discipline of the institution or if [they] might facilitate criminal activity."¹²⁴

Though the right to receive publications was not entirely restricted, it was severely limited in certain situations.¹²⁵ Distinguishing the new test, the Court stressed that, unlike

¹²² *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

¹²³ *Id.*

¹²⁴ *Id.* at 403 n.1. Pursuant to 28 C.F.R. § 540.71 (2007), wardens may reject books, single issues of magazines or newspapers, or other print materials based on the objective of enforcing security and order, and suppressing criminal activity. To ensure the wardens follow protocol, § 540.71 provides a "non-exhaustive list of criteria" to base rejection on. *Abbott*, 490 U.S. at 405. Furthermore, if the published material is part of a subscription, the warden must review each issue independently. 28 C.F.R. § 540.71(c) (2007). Finally, the regulation requires the warden to provide procedural safeguards so that the First Amendment rights of prisoners and senders are not violated. 28 C.F.R. § 540.71 (2007).

¹²⁵ *Abbott*, 490 U.S. at 404.

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Procunier, the framework in *Turner* did not require a “least restrictive means” test.¹²⁶ Recognizing that *Turner* involved deference to prison officials, the Court extended its application to “regulations affecting the sending of a ‘publication’ to a prisoner.”¹²⁷

Applying the *Turner* factors, the Court emphasized that prison officials were particularly well-situated to determine which publications might create upset amongst inmates.¹²⁸ Following, the Court noted that it was “comforted by the individualized nature of the determinations . . . [as] under the regulations, no publication may be excluded unless the warden himself makes the determination.”¹²⁹ Accordingly, the Court found the restrictions legitimately connected to the goal of prison security, neutral in content, and rationally related to the proffered objective of maintaining safety and order.¹³⁰ Moreover, the Court found that alternative avenues for prisoner expression remained open as inmates were still allowed access to unobjectionable publications.¹³¹ The restriction was “limited to those [publications] found potentially detrimental to order and security,” and was necessary to avoid a “‘ripple effect’” amongst other inmates and prison officials.¹³² Finally, no easy alternatives had been presented or discussed by the inmates challenging the restriction.¹³³ Upholding the restrictions, the Supreme Court reinforced its ruling in *Turner* and extended its rationale to the area of prisoners’ access to certain publications.

Unlike the majority opinion, Justice Stevens remained focused on the flaws inherent in the structure of the *Turner* standard¹³⁴ and reiterated his contention that the standard was

¹²⁶ *Id.* at 411.

¹²⁷ *Id.* at 413 (internal citations omitted).

¹²⁸ *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989).

¹²⁹ *Id.* at 416.

¹³⁰ *Id.* at 414-15.

¹³¹ *Id.* at 417-18.

¹³² *Id.* at 418.

¹³³ *Id.*

¹³⁴ *Thornburgh v. Abbott*, 490 U.S. 401, 420-34 (1989).

virtually meaningless as it barely questioned the reasoning behind the publication restrictions.¹³⁵ Stressing dissatisfaction with the final prong of the test, the inquiry into alternatives, Stevens pointed to clear alternatives,¹³⁶ like clipping the offensive materials out of publications before giving them to prisoners.¹³⁷ Citing to a portion of the record in which an expert witness in the field of corrections admitted that there was no real security risk with such an alternative,¹³⁸ Stevens rejected the consideration of administrative convenience.¹³⁹

*B. Thompson v. Campbell*¹⁴⁰

Similarly, *Thompson v. Campbell* also involved restrictions on prisoners' incoming reading materials.¹⁴¹ Three restrictions were in question: first, prisoners could not receive mail that advocated anarchy or contained "obscene or sexual content;"¹⁴² second, they could only receive books, magazines, or

¹³⁵ *Id.* at 434.

¹³⁶ *Id.* at 432-33.

¹³⁷ *Id.* at 431.

¹³⁸ *Id.* Specifically, Stevens urged that "a review of the record reveals that the Court thus defers to 'findings' of a security threat that even prison officials admitted to be nonexistent." *Id.* at 432. In his footnote 17, Stevens provided actual questions and answers from trial testimony involving an expert in the field of corrections. The expert stated that he personally felt that cutting out the offensive portions of material "smacks of what goes on in fascist countries and is not a very attractive solution to me," but provided no argument that anyone other than administration would feel so uncomfortable with the situation. *Id.* at 433 n.17. Rather, the expert conceded that it "would not prevent a security threat to cut out the page if there was nothing else in [the material that was restricted]." *Id.* The expert then emphasized that the real benefit behind total censorship of questionable material was to ease administrative burdens, as no prisoners could criticize or challenge the process of what would be cut out versus what would be allowed. *Id.*

¹³⁹ *Thornburgh*, 490 U.S. at 434.

¹⁴⁰ *Thompson v. Campbell*, 81 FED App. 563 (6th Cir. 2003), *cert. denied*, *Thompson v. White*, 2004 U.S. LEXIS 3102 (U.S., Apr. 26, 2004).

¹⁴¹ *Thompson*, 81 FED App. At 564-65.

¹⁴² *Id.*

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newspapers sent directly from publishers;¹⁴³ and third, they were prohibited from receiving bulk rate mail.¹⁴⁴ While serving his life sentence in a Tennessee correctional complex, Harold Thompson was denied access to his incoming reading materials at least two dozen times, mostly due to “anarchist content.”¹⁴⁵ Prison officials asserted that the regulations were necessary to maintain order and security.¹⁴⁶

Applying the *Turner* framework, the Sixth Circuit addressed the first regulation, against reading materials involving anarchy or sexual content.¹⁴⁷ Noting the goal of prison security, the court affirmed that the regulation was neutral and necessary to maintain safety and promote rehabilitation.¹⁴⁸ Even without proof that possession of the materials caused problems amongst inmates or in the prison, the court plainly stated that its only concern was “whether a reasonable official might think that the policy advances these interests [of security].”¹⁴⁹ It seemed quite clear to the court that deference was appropriate, as allowing materials that promoted anarchy and deviant sexual behavior in

¹⁴³ *Id.* at 565.

¹⁴⁴ *Id.* Bulk-rate mail is also known as standard-rate mail, and refers to a type of mail sent with a lower postage cost. Generally, when a large number of essentially identical items must be sent out for business purposes, they will be sent as bulk-rate mail. Items such as newsletters, bulletins, catalogues, fliers, circulars and advertisements are all sent bulk-rate. United States Postal Service, Business Mail 101, <http://www.usps.com/businessmail101/classes/standard.htm> (last visited April 20, 2007); <http://www.usps.com/businessmail101/getstarted/bulkMail.htm> (last visited April 20, 2007).

¹⁴⁵ *Thompson*, 81 FED App. at 564-65.

¹⁴⁶ *Thompson v. Campbell*, 81 FED App. 563, 565-67 (6th Cir. 2003).

¹⁴⁷ *Id.* at 567-68.

¹⁴⁸ *Id.* at 567. The regulation explicitly banned materials that would “pose a threat to institutional security,” and that could “reasonably be considered to advocate, facilitate, or otherwise present a risk of lawlessness, anarchy or rebellion against government authority.” *Id.* at 564-65 (internal citations omitted). This included not only anarchy-based materials, but also sexually themed photographs, pictures, drawings, or reading materials that would in some way encourage criminal sexual deviance amongst prisoners. *Id.* at 565.

¹⁴⁹ *Id.* at 567.

prison was antithetical to maintaining order.¹⁵⁰

Under the second *Turner* factor, the court confirmed there were certainly alternative means for prisoners to exercise their First Amendment rights, as prisoners were still able to access various publications.¹⁵¹ Considering the third factor and the possible impact on the prison if the prohibited materials were allowed, the court noted the likelihood of a broad ripple effect.¹⁵² Although there was no proof that Thompson himself would rise up against prison officials or engage in deviant sexual acts if permitted the materials, the court emphasized that it could not ignore the possibility that other prisoners might also gain access to the questionable materials.¹⁵³ Ultimately, the court concluded that Thompson had failed to suggest any workable alternatives, and that the regulation, therefore, did “not represent an ‘exaggerated response to the problem at hand.’”¹⁵⁴

The court affirmed the constitutionality of the restrictions as the policy of prohibiting certain materials was logically connected to maintaining order, alternative means of reading remained open, and there were no other ways to advance the same goals. Regarding the other two regulations in question, the publisher-only rule and ban on bulk rate mail, the court simply invoked precedent under *Bell v. Wolfish* and *Sheets v. Moore*,¹⁵⁵ upholding both of these restrictions as well.¹⁵⁶

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Thompson v. Campbell*, 81 FED App. 563, 567 (6th Cir. 2003).

¹⁵³ *Id.*

¹⁵⁴ *Id.* Although Thompson did suggest that prison officials only allow him the specific reading material, and that he would promise not to distribute it to other prisoners, the court noted that such an alternative would either require prison administrators to believe Thompson’s word, or “devote considerable resources to verifying that he is keeping his word.” *Id.* at 568.

¹⁵⁵ *Bell v. Wolfish*, 441 U.S. 520, 520 (1979) and *Sheets v. Moore*, 97 F.3d 164 (6th Cir. 1996).

¹⁵⁶ As *Bell* addressed the permissibility of a publishers-only rule, and as *Sheets* found a ban on bulk rate mail constitutional, the court found no need to apply *Turner* to these restrictions.

PRISONERS' FIRST AMENDMENT RIGHTS 1249*C. Willson v. Buss*¹⁵⁷

In *Willson*, an inmate was denied access to certain special interest magazines to which he had subscribed, including *The Advocate* and *Out*, both categorized as homosexual lifestyle and interest magazines.¹⁵⁸ However, neither publication contained “sexually graphic material,” only articles that would be of special interest to homosexuals.¹⁵⁹ Pursuant to prison procedures, any incoming publication that was deemed obscene, “blatant[ly] homosexual,” or that “jeopardize[d] the safety, security, or orderly operation of [the] facility” could be restricted.¹⁶⁰

Applying *Turner*, the district court found that the purpose of the restriction was to “keep out of the prison anything that would lead a prisoner to believe another prisoner was homosexual.”¹⁶¹ Prison administrators feared that an inmate in possession of such material would be “targeted for sexual gratification, other physical abuse, and extortion.”¹⁶² While acknowledging that attitudes toward homosexuality had changed with time, and that homosexuality received protection under privacy rights through *Lawrence v. Texas*,¹⁶³ the court made it

¹⁵⁷ *Willson v. Buss*, 370 F. Supp. 2d 782 (N.D. Ind. 2005).

¹⁵⁸ *Id.* at 784.

¹⁵⁹ *Id.* *Out* and *The Advocate* were characterized by Willson as the “homosexual version of People and Newsweek, respectively.” *Id.* *Out* advertises itself as “a gay and lesbian perspective on style, entertainment, fashion, the arts, politics, culture, and the world at large.” *Out Magazine*, <http://www.out.com> (last accessed April 20, 2007). Conversely, *The Advocate* boasts its “award-winning [lesbian, gay, bisexual, transgender] news site.” *The Advocate*, <http://www.advocate.com/index.asp> (last accessed Dec. 4, 2006). Willson did not complain about his inability to read specific articles, but about the general denial of these magazines that cater to homosexual interests in entertainment, politics, culture, and world events.

¹⁶⁰ *Willson*, 370 F. Supp. 2d at 784 (referring to Westville Correctional Facility General Rules and Procedures, 2002 § XII(D)).

¹⁶¹ *Id.* at 785.

¹⁶² *Id.*

¹⁶³ Indeed, the Court noted that the shame and illegality of homosexual behavior emphasized in *Bowers v. Hardwick*, 478 U.S. 186 (1986) “was put

clear that the issue at hand was not the prisoner's right to be homosexual or to engage in homosexual acts, but rather to protect the safety and welfare of the inmate in possession of the materials.¹⁶⁴

Under the first prong of *Turner*, the court deferred to prison officials, finding the interest in protecting inmates legitimate and the regulation rational.¹⁶⁵ Citing *Thornburgh v. Abbott*, the court noted that it was not "necessary to show that materials are 'likely' to lead to violence, but rather, it is sufficient to show that in the absence of the regulation a potential danger would exist."¹⁶⁶ Arguably, there was no way to stop the magazines from circulating once inside the prison, and so it was possible that anyone in possession of the homosexual magazines could be targeted for additional violence or extortion, thereby increasing the potential danger.¹⁶⁷ Finally, the court found that, although

to rest" in *Lawrence*, but that the present case had less to do with the illegality of homosexuality as an act, and more to do with prisoners safety. *Willson v. Buss*, 370 F. Supp. 2d 784, 785 (N.D. Ind. 2005). In *Lawrence*, the Supreme Court extended the right of privacy to consensual homosexual acts, noting that:

[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Lawrence v. Texas, 539 U.S. 558, 567 (2003). The Court then contrasted the magazine regulation, demonstrating that the concern was not that inmates would find consensual romantic partners in prison, but rather that inmates would be targeted, blackmailed, raped, or the like if their fellow inmates knew of their sexual orientation. *Willson*, 370 F. Supp. 2d at 785-86.

¹⁶⁴ *Willson*, 370 F. Supp. 2d at 786.

¹⁶⁵ *Id.* at 787-90.

¹⁶⁶ *Id.* at 788 (citing *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989)).

¹⁶⁷ *Id.* at 788-89. Noting that the Ninth Circuit explicitly found that being identified as a homosexual in prison threatened prison safety because it could lead to violence against those with homosexual reading material. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989). In *Harper*, the

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the regulation was focused on restricting homosexual materials, it was content neutral.¹⁶⁸

Addressing the second *Turner* factor, the court dismissed the importance of alternative means for the inmates to access homosexual-related reading materials in light of the importance of the security rationale.¹⁶⁹ Similarly, the court did not spend much effort on the third factor, finding the same safety concerns and difficulties would result if the prison were forced to accommodate the prisoners' desire for such material.¹⁷⁰

Finally, under the fourth *Turner* factor, the court reviewed the inmate's suggested alternative that the magazines be prohibited from common areas, but allowed in private cells, thereby decreasing the possibility that the magazines would be passed around and lead to violence against those in possession.¹⁷¹ The suggestion was, however, quickly dismissed as "sexual items, including those promoting homosexual activity" were already prohibited from use or display in common areas.¹⁷² Noting that the proposed alternative would do nothing to prevent the labeling of those in possession of the magazines, the court found the threat of violence remained and accordingly affirmed the constitutionality of the regulation.¹⁷³

As demonstrated through *Abbott*, *Thompson* and *Willson*, courts at all levels have found that the *Turner* test provides a workable balance between prisoners' First Amendment rights and the needs of prison administrators. These cases demonstrate a clear penological interest in prohibiting prisoners from having

prisoners challenged a ban on mail from the North American Man Boy Love Association (NAMBLA). *Id.* The Ninth Circuit emphasized safety concerns were well founded as "inmates who are identified as or suspected of being pedophiles or homosexuals are a favorite target for violence since many incarcerated felons were sexually abused as children." *Willson*, 370 F. Supp. 2d at 781 (citing *Harper*, 877 F.2d at 730, 733).

¹⁶⁸ *Willson*, 370 F. Supp. at 789.

¹⁶⁹ *Willson v. Buss*, 370 F. Supp. 782, 790 (N.D. Ind. 2005).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 790-92.

¹⁷³ *Id.* at 791.

deviant or disruptive materials, recognizing the possible harm that would result if prisoners were allowed access. Be it the possibility of violent outbreaks as in *Abbott*, chaos or sexual deviance as in *Thompson*, or inciting harassment and violence as in *Willson*, the regulations were justified by the need of prison officials to protect inmates and to avoid future harm.

III. DECONSTRUCTING *BEARD V. BANKS*

The first and second parts of this Comment illustrated the formulation of the standard of review in cases concerning prisoners' First Amendment rights. Part III examines the background of *Banks* and addresses the reasoning behind the Supreme Court's decision to apply *Turner* so deferentially. Section A focuses specifically on the Court's analysis of the regulation, and highlights the deferential and detached review under the four-factor test. Section B then examines the concurring and dissenting opinions in *Banks*.

In *Banks*, the Court found a rational relationship between the goal of prisoner safety and rehabilitation, and the resulting restrictions on reading materials and personal photographs.¹⁷⁴ In its application of *Turner*, however, the Court arguably failed to truly scrutinize the restrictions under the third and fourth prongs,¹⁷⁵ resulting in something more akin to automatic deference than judicial review. Though the *Turner* factors appeared to be clear, concise and fair, as *Abbott*, *Thompson*, and *Willson* demonstrate, the Supreme Court's decision in *Beard v. Banks* suggests that either *Turner*'s usefulness has been exhausted, or that any regulation could pass the test if its basis is rational. By misapplying *Turner* and failing to establish the validity of the justifications behind the regulation, the Supreme Court opened the door for confusion as to how future courts should apply, or even consider, *Turner*.

¹⁷⁴ *Beard v. Banks*, 126 S. Ct. 2572, 2574 (2006).

¹⁷⁵ *Id.* at 2580

PRISONERS' FIRST AMENDMENT RIGHTS 1253*A. The Total Misapplication of Turner*

Like *Abbott*, *Thompson* and *Willson*, the recent case of *Beard v. Banks* involved restrictions on prisoner access to certain publications.¹⁷⁶ Yet, unlike previous cases, the regulations in *Banks* were not justified by safety or necessity, but instead by the need to rehabilitate prisoners.¹⁷⁷

Banks involved a Pennsylvania state prison restriction that prohibited inmate access to newspapers, magazines, and personal photographs.¹⁷⁸ The ban only affected inmates housed in the most restrictive level of the prison, Long Term Segregation Unit ("LTSU"), Level 2. This unit held the most contentious prisoners—individuals categorized by one or more of the following: "assaultive behavior;" "causing injury to other inmates or staff;" engaging in disturbing behavior; possessing weapons; a history of escape attempts; or "being a sexual predator."¹⁷⁹ Upon entering the prison, all inmates were initially assigned to Level 2.¹⁸⁰ Thus, the restriction applied to all inmates at one time or another, regardless of behavioral problems. Inmates remained in Level 2, subject to the restrictions unless, after 90 days, prison administrators believed the inmate worthy of a less restrictive level.¹⁸¹ As noted by the Court, however, in practice, most inmates never graduated to a different level.¹⁸² Despite the restrictions, all inmates were allowed "legal and personal correspondence, religious and legal materials, two library books, and writing paper."¹⁸³

¹⁷⁶ *Id.* at 2572.

¹⁷⁷ *Id.* at 2578.

¹⁷⁸ *Id.* at 2576.

¹⁷⁹ *Id.* Some of the other factors include "failure to complete the SMU [Special Management Unit] program. . . engaging in facility disturbances; belonging to an unauthorized organization or Security Threat Group; engaging in criminal activity that threatened the community. . . exerting negative influence in facility activities." *Id.*

¹⁸⁰ *Beard v. Banks*, 126 S. Ct. 2572, 2576 (2006).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 2577.

The challenge to the regulation was brought by Ronald Banks, a prisoner in LTSU Level 2, against the Secretary of the Pennsylvania Department of Corrections, Jeffrey Banks.¹⁸⁴ Justifying the restrictions, the Secretary claimed (1) the “need to motivate better behavior on the part of particularly difficult prisoners,” (2) the need to minimize the amount of material in prisoner cells, and (3) prison safety.¹⁸⁵ Upon review, however, the Supreme Court only addressed the first justification, finding it to be a “legitimate penological objective” and rationally connected to the restrictions, thereby satisfying the first *Turner* factor.¹⁸⁶ As prisoners were left with so little personal property or freedom in Level 2, the Court reasoned that the regulation was effective in depriving the inmates of “virtually the last privilege left,” providing an incentive for better behavior.¹⁸⁷

Addressing the second *Turner* factor, the alternative means for the prisoner to exercise the restricted right, the Court found simply that there were none.¹⁸⁸ Citing prison statistics,¹⁸⁹ the Court noted that while, after 90 days, prisoners could be moved and granted limited access to newspapers and magazines,¹⁹⁰ only approximately one out of four inmates ever actually graduated to a less restrictive level.¹⁹¹ Though previous applications of *Turner* suggested that the absence of any alternative would “provide evidence that the regulations [were] unreasonable,”¹⁹²

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 2578.

¹⁸⁶ *Beard v. Banks*, 126 S. Ct. 2572, 2579 (2006).

¹⁸⁷ *Id.* at 2579.

¹⁸⁸ *Id.* at 2579-80.

¹⁸⁹ To illustrate the restrictions on prisoners, the Court noted that the LTSU is one of three special units in the Pennsylvania prison system meant for the most difficult prisoners, “the commonwealth’s most incorrigible, recalcitrant inmates.” *Id.* at 2576. These special units restrict the majority of prisoner activity. There are approximately forty inmates within the LTSU, and all inmates are initially placed in Level 2 of the LTSU. *Id.*

¹⁹⁰ In Level 1, prisoners are allowed one newspaper and five magazines, but still no personal photographs. *Id.* at 2577.

¹⁹¹ *Banks*, 126 S. Ct. at 2579.

¹⁹² *Beard v. Banks*, 126 S. Ct. 2572, 2580 (2006) (citing *Overton v.*

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the Court in *Banks* emphasized that the lack of any alternative means of access to newspapers, magazines, and personal photographs was not determinative and that the restrictions were, nonetheless, reasonable.¹⁹³

There was no further discussion of the second *Turner* factor. Although *Turner* emphasized that alternatives should be considered, the *Banks* court gave no rational or insight into its judgment.¹⁹⁴ While in theory the second *Turner* factor balances deference to prison officials with the need to protect prisoners from total deprivation, in *Banks*, application of the second factor was brief, overly deferential, and without real consideration of other alternatives.¹⁹⁵

Evaluating the potential impact on the administration and other prisoners under the third *Turner* prong, the Court again provided simple, deferential review.¹⁹⁶ Curtailing access to newspapers, magazines, and photographs provided incentive for prisoners to adhere to prison policy.¹⁹⁷ Notably absent is any discussion of the possible “ripple effect” that removing the restriction would cause. This stands in contrast to the Court’s analysis of the restrictions at issue in *Willson*, *Thompson* and *Abbott*.¹⁹⁸ In those cases, lifting the restrictions would have affected the prison community as a whole. In *Banks*, however, the only impact would be a reduction of incentives to behave

Bazzetta, 539 U.S. 126, 135 (2003)).

¹⁹³ *Id.* at 2580.

¹⁹⁴ *Turner v. Safley*, 482 U.S. 87, 90 (1987).

¹⁹⁵ *Banks*, 126 S. Ct. at 2579-80. Truly, discussion of the second factor was limited to one paragraph, simply noting that while there were no alternatives, it did not conclusively mean the regulation was not rational or reasonably related to the goal of the prison administration.

¹⁹⁶ *Id.* at 2580.

¹⁹⁷ *Id.*

¹⁹⁸ In *Willson*, *Thompson*, and *Abbott*, the Court scrutinized the impact of allowing the right, whether it was the personal safety of other inmates, safety of the prison environment, or the possibility of violence and harassment. Because allowing the restricted reading material in *Willson*, *Thompson*, and *Abbott* would clearly create or exacerbate problems in prison administration and general safety, the impact of allowing the restricted reading material was simply too great to allow.

better.¹⁹⁹

Addressing the final *Turner* factor, the Court again noted that because the restriction was based on policy ideals, there were simply no viable alternatives or less restrictive ways to accomplish the goals.²⁰⁰ Recognizing that its application of the second, third, and fourth factors was circularly deferential, based on the rehabilitation goals of the Secretary, the Court justified its behavior by noting that these factors did little to add to “the first factor’s basic logical rationale.”²⁰¹ Rather, it suggested that balancing the factors took a back seat to determining “whether the Secretary [had shown] more than simply a logical relation, that is, whether he [had shown] a *reasonable* relation.”²⁰² This, perhaps, was the Court’s way of saying that the *Turner* test, in fact, was not satisfied, or that the four-factor test was simply inapplicable in a situation in which the goal was rehabilitation—a goal that does not necessarily allow for alternative avenues of expression.

Citing *Overton v. Bazzetta*,²⁰³ the Court opined that there was truly no other way to “induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.”²⁰⁴ The *Banks* Court found that the

¹⁹⁹ Ironically, the reward incentive of depriving prisoners of access to these materials did not even appear effective in the first place. According to prison statistics already referenced by the Court, only approximately one in four inmates were ever rehabilitated enough to leave Level 2 and graduate into better circumstances. *Beard v. Banks*, 126 S. Ct. 2572, 2590 (2006). Furthermore, all inmates were initially placed into Level 2, so there was no way to keep track of if and how this specific regulation on its own was impacting inmate behavior. *Id.* It perhaps belabors the point to emphasize that if the worst of the worst are being contained in Level 2, there is little chance that merely depriving them from personal photographs or newspapers would encourage a total turnaround in behavior.

²⁰⁰ *Banks*, 126 S. Ct. at 2580.

²⁰¹ *Id.*

²⁰² *Id.* (emphasis in original).

²⁰³ *Overton v. Bazzetta*, 539 U.S. 126 (2003).

²⁰⁴ *Banks*, 126 S. Ct. at 2580 (quoting *Overton*, 539 U.S. at 134). In *Overton*, the Court upheld visitation restrictions on prisoners who violated prison substance abuse guidelines. The restrictions required that all visitors be

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restrictions as issue, like those in *Overton*, were aimed at a discrete set of individuals, and had resulted from the professional judgment of prison administrators.²⁰⁵

Furthermore, the Supreme Court dismissed outright the Third Circuit's analysis and ultimate rejection of the restriction, noting that the lower court placed too much of an evidentiary burden on the Secretary.²⁰⁶ While the court below was concerned with whether the restrictions would actually be effective in modifying behavior and "whether the deprivation

pre-approved by the prison administration, included family and ten other visitors, but that no children under the age of eighteen could be on the list unless they were somehow related to the prisoner. *Overton*, 539 U.S. at 129 (2003). However, if the prisoner was guilty of multiple prison violations, visitation privileges were restricted to attorneys and religious leaders. *Id.* at 130.

²⁰⁵ *Beard v. Banks*, 126 S. Ct. 2572, 2580 (2006).

²⁰⁶ *Id.* at 2581. The Third Circuit expressed hesitation regarding the rehabilitation justification. While agreeing that "deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates," the court was not satisfied that the regulations actually served the purpose. *Beard v. Banks*, 399 F.3d 134, 140-41 (3rd Cir. 2005). If the restrictions were placed on prisoners for limited amounts of time, whenever prisoners were shown to violate rules or regulations, then surely the restrictions could pass as a way to encourage better behavior. *Id.* at 141. However, the court noted that because the prohibition would likely not have a great impact on inmate behavior, in light of all the other restrictions imposed on prisoners, "the relationship between the policy and the penological interest may be too attenuated to be reasonable." *Id.* at 144. Emphasizing that the prisoners were not requesting "unlimited access to innumerable periodicals," the court was at a loss in distinguishing how writing paper and religious texts could be differentiated and assumed to be any less of a security threat. *Id.*

In his dissent, Judge Alito recognized that the uncertainty surrounding how, when or why an inmate may be transferred out of Level 2 could impact "the degree of the incentive," it did not follow that "the incentive is wholly destroyed." *Id.* at 149 (Alito, J., dissenting). Additionally, Alito argued that the *Turner* test had never required evidentiary proof of the effectiveness of regulations, finding that "the entire system of prison discipline might be imperilled [sic] if each sanction for prison misconduct could not be sustained without empirical evidence that the sanction provided some incremental deterrent." *Id.*

theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates,”²⁰⁷ the Supreme Court emphasized the need for deference.²⁰⁸ Accordingly, the Court upheld the regulations.²⁰⁹

*B. Deprive and then Make Better: Concurring and
Dissenting Justices Emphasize the Faulty
Rehabilitative Reasoning of Banks*

The Court’s decision in *Banks* was not unanimous.²¹⁰ Both concurring and dissenting justices chastised the majority’s quick approval of the rehabilitative goals of the Pennsylvania system, and fast and loose application of *Turner*.

In his concurrence, Justice Thomas pointed out that perhaps the reason the majority had such a difficult time applying the *Turner* factors was due to the fact that the *Turner* framework was not developed with regulations “that seek to modify inmate behavior through privilege deprivation” in mind.²¹¹ Rather, Justice Thomas stressed the fact that in application, such rehabilitative regulations will, without a doubt, pass muster under the first factor of reasonableness, but will necessarily fail under the second. “Such policies, by design, do not provide an ‘alternative means’ for inmates to exercise the rights they have been deprived.”²¹² As to the third and fourth factors, Justice Thomas noted that there was truly no reason to evaluate whether the regulation was impinging on prisoner rights if the goal of rehabilitation was being fulfilled.²¹³

Delving further into the majority’s flawed reasoning, in his dissent Justice Stevens addressed the fact that while the

²⁰⁷ *Banks v. Beard*, 399 F.3d 134, 140-141 (3d Cir. 2005).

²⁰⁸ *Banks*, 126 S. Ct. at 2581.

²⁰⁹ *Id.* at 2582.

²¹⁰ *Id.* at 2582-93 (2006). Justices Thomas and Scalia concurred in the judgment of the case, while Justices Stevens and Ginsburg dissented. *Id.*

²¹¹ *Beard v. Banks*, 126 S. Ct. 2572, 2584 (2006) (Thomas, J., concurring).

²¹² *Id.*

²¹³ *Id.* at 2585.

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Secretary presented several penological reasons for the restrictions, the majority only addressed one—that of rehabilitation.²¹⁴ Concentrating on the other proffered justifications for the regulation, Stevens pointed to the Secretary's contention that the regulation was necessary in order to limit the amount of materials an inmate could have in his cell.²¹⁵ Referencing the record below, Stevens noted that each inmate was allowed a variety of materials in his cell, including bedding, toilet paper, writing paper, envelopes, socks, underwear, religious newspapers, Bibles, a lunch tray, plate and cup.²¹⁶ Any of these items, Stevens argued, could easily be used to start fires, throw feces, and create other dangerous situations, all of which prison administrators noted were of concern in enacting the regulation.²¹⁷ As such, he posited, this aspect of the Secretary's justification for the restriction could not be deemed logical, as the restricted newspapers, magazines and personal photographs would not likely exacerbate the cluttered environment of the prison cells.²¹⁸

Justice Stevens also noted that the method and nature of the majority's review provided no limit on prison regulations or general deprivation where rehabilitation was concerned.²¹⁹ He argued that such a justification had no stopping point: "if sufficient, it would provide a 'rational basis' for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the

²¹⁴ *Id.* at 2586 (Stevens, J., dissenting).

²¹⁵ *Id.* at 2586-87.

²¹⁶ *Id.* at 2586.

²¹⁷ *Beard v. Banks*, 126 S. Ct. 2572, 2586 (2006).

²¹⁸ Emphasizing the tenuous logical connection, Stevens referred to a prison official's deposition that conceded inmates could always use what they were allowed in their cells to misbehave in the way prison officials feared. *Id.* at 2587. Specifically, in Superintendent Dickson's deposition, he admitted that inmates could easily start fires with the allowed writing paper and bedding, and could easily throw feces and urine with the cup inmates were provided with in their cells. *Id.*

²¹⁹ *Id.* at 2588.

right at some future time by modifying his behavior.”²²⁰ Furthermore, Justice Stevens called attention to the fact that if the Court could always view deprivation for rehabilitation as rational, the *Turner* test would effectively be obviated.²²¹

To ensure that rehabilitation would not be used to justify all limitations on prisoners’ rights, Justice Stevens underscored the need for more review and less deference to prison officials.²²² Even if there were a bare “logical connection to rehabilitation . . . prison officials are not entitled to judgment as a matter of law.”²²³ Furthermore, in light of the other restrictions placed on inmates in the LTSU Level 2, Stevens emphasized that there already were great incentives for prisoners to behave better with the hope of graduating into a less restrictive level.²²⁴ Moreover, because prisoners were never given access to personal photographs, even if they did graduate to Level 1, there was a clear indication that the regulation was in fact an exaggerated response to prisoner behavior.²²⁵ Plainly, the deprivation was not linked to any need for rehabilitation, as there were already restrictions accomplishing the objective.²²⁶

In a separate dissent, Justice Ginsburg also emphasized the

²²⁰ *Id.*

²²¹ *Id.* In making his point, Justice Stevens invoked the marriage regulation challenged in *Turner*. If the denial of marriage could also have been justified on a rehabilitation basis, Stevens emphasized that the Court would have likely let the regulation stand, even though, under *Turner*, the very same court focused on the illogical justification behind the regulation. *Id.*

²²² *Id.* at 2588-89.

²²³ *Beard v. Banks*, 126 S. Ct. 2572, 2588-89 (2006). Indeed, one of the most disturbing aspects of *Banks* may be that the case was decided on Beard’s motion for summary judgment. *See id.* at 2576.

²²⁴ *Id.* at 2589. In addition to the restrictions on newspapers, magazines and personal photographs, inmates in Level 2 were also not allowed to watch television or listen to the radio, cannot use the commissary, cannot earn the GED or “special education study,” will not receive compensation for work done in the unit as a janitor, and are confined to solitary confinement 23 hours a day. *Id.* at 2589.

²²⁵ *Id.* at 2589-90.

²²⁶ *Id.*

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faulty rehabilitation theory.²²⁷ Criticizing the deference employed by the majority, she noted that the evidence and justifications provided by the Secretary would “justify virtually any prison regulation that [did] not involve physical abuse.”²²⁸ Drawing on *Turner*, Justice Ginsburg pointed out that if the logical connection between the regulation and the goal was “so remote as to render the policy arbitrary or irrational,” then the regulation must be struck down.²²⁹ Arguably, it was irrational to deprive inmates of knowledge about current events like Hurricane Katrina or the Iraq war because they still had access to other publications, such as the “Jewish Daily Forward,” as it was a religious publication.²³⁰ Stressing the importance of evidentiary testimony in analyzing the reasonableness of the regulation, Ginsburg noted that much information was left to be desired.²³¹

Indeed, Justices Thomas, Stevens and Ginsburg all recognized the inappropriateness of *Turner*’s application in *Banks*. At the very heart of *Turner* is an attempt to balance deference with protection, and because the prior applications of *Turner* involved maintaining prison safety as the ultimate goal, the question became: should *Turner* still be applied in situations in which the ultimate goal of prison administrators is a vague notion of rehabilitation?

IV. PROPOSED SOLUTION: RECALIBRATING THE DEFERENCE

Parts I, II, and III of this Comment provided a substantial background in case law involving prisoners’ First Amendment rights, illustrating how courts analyze and balance the interests involved, and further examined the loose application of *Turner*

²²⁷ *Id.* at 2591-93.

²²⁸ *Id.* at 2592.

²²⁹ *Beard v. Banks*, 126 S. Ct. 2572, 2593 (2006).

²³⁰ *Id.* Referencing current events of the time, Justice Ginsburg was drawing on the fact that prisoners were prevented from reading newspapers or magazines and thereby prevented from following news stories that not only affected the country, but which had international significance as well.

²³¹ *Id.*

in *Banks*. Part IV suggests alternatives to the Court's approach and use of *Turner* in situations in which rehabilitation is offered as an ultimate justification.

There are many definitions of rehabilitation, including: "to restore to a former capacity,"²³² "to restore or bring to a condition of health or useful and constructive activity,"²³³ and "preparation for release back into society."²³⁴ While the American correctional system is primarily focused on deterring and punishing criminal behavior,²³⁵ prisons of course may still provide or require programs that encourage behavioral reform.²³⁶ Yet, if a rehabilitative program deprives prisoners' of First Amendment rights, but does not even attempt to justify the deprivation as necessary to address a specific behavioral problem, there is cause for concern.

In *Banks*, prison administrators never claimed that the inmates in Level 2 of LTSU had abused privileges for certain reading materials,²³⁷ or that their crimes were somehow

²³² Merriam-Webster's Online Dictionary, <http://www.m-w.com/dictionary/rehabilitation> (last accessed April 20, 2007).

²³³ *Id.*

²³⁴ Brief for the ACLU et. al. as Amici Curiae Supporting Respondent, *Beard v. Banks*, 126 S. Ct. 2572 (2006) (No. 04-1739).

²³⁵ See generally, Michel Foucault, *Discipline and Punish: the Birth of Prison* (Editor Vintage Books 1995) (1979).

²³⁶ As the Supreme Court noted in *McKune v. Lile*, 536 U.S. 24 (2002), rehabilitation is a valid objective of correctional facilities as "most offenders will eventually return to society." *Id.* at 36. In *McKune*, the Court addressed the constitutionality of sexual abuse treatment programs and policies for prisoners who were convicted of sex-based crimes. *Id.* If the prisoners refused to participate in the rehabilitation program, they could be denied certain privileges including visitation rights, television, and working opportunities. *Id.* at 24. Recognizing that sexual offenders were more likely than any other offender to engage in similar crimes, the Court recognized that deprivation for the sake of rehabilitation may be justified if the deprivation relates to the prisoner's specific conviction. *Id.* at 32-35. See also, *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638-39 (7th Cir. 2005) (recognizing administration could rightfully deny prisoner access to a book if the book would encourage the same deviate behavior that prisoner was incarcerated for).

²³⁷ See Brief of Petitioner at 4, *Beard v. Banks*, 126 S. Ct. 2572 (2006)

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connected to the prohibited newspapers and magazines. Nor was any evidence provided to support the contention that deprivation of the items would actually motivate better behavior.²³⁸ Prisoners were already placed in solitary confinement for 23 out of 24 hours a day, denied television and radio, and were prevented from earning their GED or taking special education classes.²³⁹ Upon close examination, the regulation at issue looks more like intensive punishment rather than a motivational tactic.²⁴⁰ Surely the measures already in place are incentive enough. Then again, only one out of every four inmates in Level 2 improves his behavior enough to be moved into Level 1,²⁴¹ indicating that the theory behind depriving the prisoners rights in order to encourage better behavior is actually without any evidentiary support. Even the use of the word “rehabilitation” in this context smacks of irony. If a prisoner is kept in Level 2 for the term of his sentence, and denied access to news or current events, it is likely is that he will re-enter society at a distinct disadvantage.²⁴² Surely total social isolation does not foster any

(No. 04-1739).

²³⁸ In fact, administrators only claimed that the prisoners were difficult to handle and that therefore further deprivation would provide general deterrence. *Id.*

²³⁹ *Beard v. Banks*, 126 S. Ct. 2572, 2589 (2006).

²⁴⁰ Brief for the ACLU et. al. as Amici Curiae Supporting Respondent, *Beard v. Banks*, 126 S. Ct. 2572 (2006) (No. 04-1739).

²⁴¹ *Banks*, 126 S. Ct. at 2576.

²⁴² Indeed, in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Supreme Court emphasized the important role of newspapers and magazines in informing the public as to national affairs. *Id.* at 250. Because these forms of media provide the public with a universe of information about their government, newspapers and magazines are the ultimate tool for individuals to engage in political discourse and provide “restraints upon misgovernment.” *Id.* Furthermore, in *Banks v. Beard*, below, the Third Circuit noted a similar irony in the use of the deprivation as a means for rehabilitation, noting that “rehabilitative goals are ‘furthered by efforts to inform and educate inmates, and foster their involvement in the world outside the prison gates.’” 399 F.3d 134, 142 (citing *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985)). The court also referenced the negative psychological impact that may result in prisoners who are deprived access to reading material. *Banks*, 399 F.3d at 142 (citing *Spellman v. Hopper*, 95 F.

legitimate rehabilitative goals.

Because the rationale behind the restriction in *Banks* is vague and overbroad, the Court's application of *Turner* provokes concern, suggesting any regulation could be justified as rehabilitative in nature. To ensure that this does not happen, and that prisoners retain their fundamental First Amendment rights, there must be less deference from the courts. Rather, *Turner* should be applied with an exacting eye, allowing for balance between the respect and trust owed to administrators who best know the system, and the importance of prisoners' rights. Courts would do better to remember *Turner's* predecessor, *Procunier v. Martinez*, and to scrutinize the justifications behind all-encompassing regulations, ensuring they do not go further than necessary.

When the *Turner* test was applied in *Banks*, there was clear friction between the first part of the test and the other three.²⁴³ Because the first factor inquires as to rationality, the connection between the regulation and a legitimate penological interest, the justification of rehabilitation passes without much scrutiny.²⁴⁴ As

Supp. 2d 1267, 1281 (M.D. Ala. 1999)).

²⁴³ *Banks*, 126 S.Ct. at 2579. This was indeed explicitly recognized by the majority:

In fact, the second, third, and fourth factors, being in a sense logically related to the Policy itself, here add little, one way or another, to the first factor's basic logical rationale . . . The fact that two of these latter three factors seem to support the Policy does not, therefore, count in the Secretary's favor. *The real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation*, that is, whether he shows a *reasonable* relation. We believe the material presented here by the prison officials is sufficient to demonstrate that the Policy is a reasonable one.

Id. (emphasis added).

²⁴⁴ As noted in *Abbott, Thompson and Willson, infra*, Part II, so long as prison administrators were able to justify a regulation as addressing security concerns, courts generally accepted the interest and application as plainly rational. Because rehabilitation is recognized as one of the objectives correctional facilities, it too serves a rational purpose. See *McKune v. Lile*, 536 U.S. 24, 36 (2002) (finding rehabilitation serves a valid goal by

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illustrated in *Banks*, however, because rehabilitation is such a weighty goal, the Supreme Court found it requires only a *logical* relation to the regulation,²⁴⁵ rendering the remaining three factors useless.²⁴⁶

If, however, the first factor were applied with less deference at the outset, the *Turner* test could still successfully be applied in cases such as *Banks*. The first *Turner* factor is intended to address the need for logic,²⁴⁷ and the Supreme Court should have truly examined the logic behind the regulation and scrutinized its tailoring. Under such critical analysis, it is likely that the ban on newspapers, magazines and personal photographs would have failed constitutional scrutiny, due to the lack of a reasonable relationship, and thus would not have passed the first prong of *Turner*.

A restriction should not be looked at in isolation, but must be considered in light of the prison system and other regulations as a whole.²⁴⁸ While, at face value, the ban on certain reading materials may appear logical, (in the sense that deprivation could encourage better behavior), a general awareness of how Level 2 functions illustrates how the regulation at hand is anything but.²⁴⁹ Moreover, while the possibility of rehabilitative programs was once heralded by the prison community, the general idea that harsh treatment of prisoners will deter and rehabilitate them has been questioned by recent studies.²⁵⁰

reshaping offenders before they return the general society).

²⁴⁵ *Beard v. Banks*, 126 S.Ct. 2572, 2579 (2006).

²⁴⁶ *Id.*

²⁴⁷ *Turner v. Safley*, 482 U.S. at 78, 81-82 (1987).

²⁴⁸ *See infra*, Part IC, discussion of the second *Turner* factor.

²⁴⁹ Coupled with the pre-existing regulations against telephone calls, television, radio, commissary, and solitary confinement, it is illogical to conclude that an additional restriction on reading materials would really be the straw that broke the camels back. It is illogical to conclude that the additional deprivation would be the serum to change prisoners' ways.

²⁵⁰ *See* Brief for the ACLU et. al. as Amici Curiae Supporting Respondent at *19, *Beard v. Banks*, 126 S. Ct. 2572 (2006) (No. 04-1739) (referencing M. Keith Chen and Jesse M. Shapiro, *Does Prison Harden Inmates? A Discontinuity-based Approach* (2005), <http://www.som.yale.edu/Faculty/keith.chen/papers/prison072405.pdf> at 1 ("harsher prison conditions

Even if a denial of prisoners' First Amendment freedoms was justified by rehabilitative goals, and seen as logical, rational, and reasonable, the Court's constitutional analysis should not stop there. The deferential nature of the *Turner* test should be further checked by an inquiry into whether the regulation goes too far, particularly in the present instance, where the justification of rehabilitation is all encompassing. This idea was first put forth in *Procunier v. Martinez*²⁵¹ and is echoed in sentiment in the second and fourth parts of the *Turner* test.²⁵² Yet, when the second and fourth factors of *Turner* were applied in *Banks*, the overwhelming rehabilitative justification seemed to swallow their impact and importance.²⁵³

To counteract this result, a court must push further. A restriction that deprives prisoners' fundamental right to read must be looked at with a narrowed eye.²⁵⁴ Here, even under the

are associated with significantly more post-release crime").

²⁵¹ While developing the standard in *Procunier*, the Court noted that it was necessary for prison administrators not only to justify regulations, but that they must also "show that [the] regulation . . . furthers one or more of the substantial governmental interests of security, order, and rehabilitation." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). This emphasis on the need to actually *show* a relationship between the means and the goal was coupled with the Court's requirement that the limitation "must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* If the restriction was therefore supported by a valid goal but "its sweep [was] unnecessarily broad," the Court would find it went too far. *Id.* at 414.

²⁵² Because the second part of *Turner* focuses on the available alternatives that prisoners have to express their rights, and as the fourth prong seeks to ensure that the regulation is not an exaggeration in scope, it is clear that *Turner* is concerned with whether prisoners' rights are protected from overbearing regulations. *See Turner*, 482 U.S. at 90-91.

²⁵³ This is only emphasized by the fact that the Court explicitly recognized that it was not concerned with balancing the various parts of *Turner*. *See Beard v. Banks*, 126 S. Ct. 2572, 2579-80 (2006).

²⁵⁴ The basic civil right of prisoners to be able to read and stay informed as to national events is indeed well recognized by both federal and state prison regulations. The federal Bureau of Prisons explicitly recognizes that prisoners "have the right to a wide range of reading materials for educational purposes and for your own enjoyment. These materials may include

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rehabilitative standard, it is clear that the regulation does go too far. There is no proof that the regulation improved the one out of four passing rate from Level 2 to Level 1, nor are prisoners afforded alternate access to the materials in question. Unlike the regulations at hand in *Willson*, *Abbott*, and *Thompson*, safety is not the real issue.²⁵⁵

As *Banks* was decided in a recent term, public acknowledgment or backlash is yet to be seen regarding the permissibility of such broad restrictions on prisoners' First Amendment rights.²⁵⁶ Nonetheless, so long as the reasoning in

magazines and newspapers sent from the community, with certain restrictions." See 28 C.F.R. § 541.12 (2007). Although the Supreme Court, and courts across the country, have previously found that this right to read certain materials is not unlimited, a complete and total ban on certain reading materials is very rare. See Brief for the ACLU et. al. as Amici Curiae Supporting Respondent at *18, *Beard v. Banks*, 126 S. Ct. 2572 (2006) (No. 04-1739), at *21 (referencing *Corrections Compendium*, High Level Security Inmates, September 2003, tbl. 4 (only three out of forty-one prisons surveyed only allow high security prisoners access to books alone)). Additionally, as noted in *Procunier*, California Penal Code Section 2600 also recognizes the importance of the bare fundamental right of prisoners to read and stay informed about current events. *Procunier*, 416 U.S. at 403, n.6. Specifically, the California Penal Code ensures prisoners that they will not be deprived essential civil rights such as the right to "purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office." Cal. Penal Code §2600.

²⁵⁵ The goals put forth in *Banks* "includ[ed] the need to motivate better behavior on the part of particularly difficult prisoners, the need to minimize the amount of property they control in their cells, and the need to assure prison safety, by, for example, diminishing the amount of material a prisoner might use to start a cell fire." *Banks*, 126 S.Ct. 2579. So although prison officials offered safety as one of the rationales, the Court never actually addressed the safety concerns, perhaps because they were irrational in light of all of the other permissible items that prisoners were allowed to have in their cells. *Id.* at 2586 (Stevens, J., dissenting).

²⁵⁶ While it cannot be discounted that there are state penal codes like that of California, see, *supra* n.254, which seek to ensure that prisoners retain some of their basic civil rights as far as reading materials are concerned, the holding in *Banks* suggests that the states need not worry themselves over affording such protections. Being that the restriction in *Banks* was approved by the Supreme Court, it may actually become less likely for states to initiate

Banks stands without revision or input from local legislatures or prison administration, the plesantry of “rehabilitation” will allow punishment in disguise. Merely calling torture “rehabilitation” could reassure a reviewing court that deprivation of fundamental rights is a necessary, positive step. When the next inevitable challenge to prison regulations arises, the reviewing court will have to decipher what the Supreme Court was truly saying in *Banks*. Unless and until local authorities step in to raise the bar in the treatment of prisoners’ First Amendment rights, we will have to wait for the Court to clarify how far is too far. The Court must recognize the impact of its decision, increase the scrutiny established in *Procunier*, and ensure we go no further than necessary in the denial of fundamental rights.

CONCLUSION

As part of their punishment, prisoners cannot expect that they will retain all constitutional freedoms. Yet, we pride ourselves as a country that still recognizes prisoners have certain inalienable rights, like the right to marry, to read, or communicate with others. As such, we carefully monitor how and why and when inmates are deprived of their First Amendment freedoms; our courts formally recognize the need alternative means of expression if one form is denied.²⁵⁷

Over the years, the Supreme Court developed a four-part test to analyze challenges to prison regulations that are considered too extreme in the deprivation of certain rights.²⁵⁸ When the test was first enunciated in *Turner*, and later applied in subsequent cases, it proved to be effective in weighing and balancing the

similar forms of protection for their inmates if such protection is not seen as essential.

²⁵⁷ See *Turner v. Safley*, 482 U.S. 78, 90-91 (1987) (noting that if alternative means remain open for the prisoners to exercise the same right, then the Court may be more deferential to prison administrators and their justifications of the restriction in question).

²⁵⁸ See, *supra*, Part I.

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competing interests of prisoners and administrators.²⁵⁹ The test respected the need for prisoners to express themselves, while also recognizing the challenges in running correctional facilities.

However workable the *Turner* test first seemed, it is no longer. When applied in *Banks*, it became all too obvious that the current Supreme Court did not want to get involved in overseeing prison administrators or setting limits to correctional theories.²⁶⁰ By accepting Pennsylvania's prison regulation prohibiting LTSU Level 2 inmates from having access to newspapers, magazines and personal photographs, the Supreme Court manipulated *Turner* to reach its desired outcome. Once the Court was told that the regulation was instituted for a rational purpose, it glossed over the significance of the other factors at play.²⁶¹ Disposing of *Turner's* balancing test, the Court provided unprecedented deference in light of the serious deprivation involved. Accepting the administrations' justification that prisoners should have limited access to reading materials to encourage better behavior and reduce the threat of violent or destructive behavior, the Court rolled over, leaving room for the great possibility that any fundamental right could be acceptably denied if justified by rehabilitation.

In light of the freedoms involved, and the deprivations already imposed on prisoners, there must be a change in the way in which such regulations are reviewed. If the purpose behind a regulation is said to encourage rehabilitation, or justified because of its theory that deprivation makes one better, the reviewing court must ask for clear correlation between purpose and effect. Further, there must be increased scrutiny to ensure the regulation does no more than what is absolutely necessary to accomplish the stated goal. Otherwise, simply justifying any restriction as rehabilitative could easily lead to a system where

²⁵⁹ See, *supra*, Part II.

²⁶⁰ See *Beard v. Banks*, 126 S.Ct. 2572, 2580-82 (2006) (finding that the evidentiary burden of the justification was met even though the Secretary had only submitted a statement and deposition in support of the regulation).

²⁶¹ See *id.* at 2580 (admitting the second, third and fourth factors were irrelevant so long as policy is deemed logical and whether means show reasonable relation).

prisoners retain no fundamental rights. While continuing to respect prison administrators and their intimate knowledge of the system, if the connection between the regulation and the desired effect is too attenuated, deference should not overwhelm our better judgment. However, until the Supreme Court again has the opportunity to address such concerns and to recalibrate the weighing of deference against rationality, local legislatures, prison administrators, and the public should expect more: that the most fundamental rights remain respected, regardless if we are criminal or not.